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In The

Supreme Court of the United States

October Term, 1985

THE CITY OF WHITTIER, a Charter City, *et al.*,

Appellants,

v.

WALNUT PROPERTIES, INC., a California corporation,

Appellee.

On Appeal From The United States Court Of Appeals For The Ninth Circuit

BRIEF OPPOSING MOTION TO AFFIRM

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I

WALNUT MISSTATES THE FACTS IN AN ATTEMPT TO STRENGTHEN ITS CASE

Appellee, Walnut Properties, Inc. (hereafter "Walnut"), misstates the facts below, apparently in a futile attempt to bolster its case. Appellant, City of Whittier, *et al.* (hereafter "Whittier"), opposes Walnut's motion to affirm on the grounds that the true facts support the arguments presented in the Jurisdictional Statement and demonstrate that this case presents substantial questions.

Throughout its Brief, Walnut attempts to confuse this Court by implying that the case below concerned only Whittier's Ordinance No. 2257. *E.g.*, Motion to Affirm (hereafter "Walnut's Brief") at 2. It is clear, however, that the district court considered and ruled upon all of Whittier's ordinances which affect adult businesses, i.e., Nos. 2116, 2121, 2128, 2138, 2254, and 2257. App. D, 31a; *see also* App. E, 35a-36a. It is the entire set of Whittier ordinances regulating adult businesses (with the possible exception of Ordinance No. 2327, adopted after the district court's judgment), which are the subject of this suit.[1]

Walnut makes a more serious misstatement of fact in implying that the district court made its decision in this case on November 16, 1983. Walnut's Brief at 4. This is apparently an attempt to counter Whittier's argument of the preclusive effect of the California appellate court decision filed December 8, 1983, by back-dating the district

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[1] Both this Brief and Whittier's Jurisdictional Statement refer to these ordinances collectively as the "Regulations."

court's decision. However, on November 16, 1983, when the parties had finished their closing statements at trial's end, the district court made no other statement than that "[t]he matter will be submitted." Reporter's Transcript ("RT") at 260. It was not until nearly three months later, at a status conference on February 13, 1984, that the district court announced its intended decision. App. E, 38a (Finding of Fact No. 16). Judgment in the case was not entered until March 8, 1984, (App. D, 31a), well after the California appellate court decision became final.

Walnut's most serious misstatement is its claim that the district court's "critical" finding was "that the provision of the City's ordinance prohibiting an adult theater from operating within 1,000 feet of a church has the effect of totally excluding adult theaters from the City." Walnut's Brief at 7. No such finding was ever made by the district court; Walnut misrepresents the court's Finding of Fact No. 20. App. E, 40a.

The "critical" finding made by the district court[2] was that the church separation provision of the Regulations was unconstitutional because there was insufficient evidence in the record to show the justification and compelling state interest necessary to support the provision. *See* App. D, 31a-32a; App. E, 38a-43a (Findings of Fact Nos. 17-19 & Conclusions of Law Nos. 4-5).

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[2] The Findings of Fact and Conclusions of Law were prepared by Walnut's counsel and adopted verbatim by the district court. The danger of this practice was recognized by this court in *Anderson v. Bessemer City*, — U.S. —, 105 S.Ct. 1504 (1985). *See also United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964).

Other than a finding that the Regulations would ban all adult businesses from Whittier's central business district, the district court's written findings make no reference to the availability of alternative sites. By finding the Regulations constitutional in all other respects, the district court necessarily found that sufficient alternative sites *did* exist within Whittier. Moreover, examination of the trial record shows that contrary to Walnut's assertion, the district court did find that there would be sufficient alternative sites.

The transcript of the trial clearly discloses that the district court relied upon the testimony of Whittier's Planning Director, Mr. Porter, and not, as the Ninth Circuit panel asserted, on Walnut's witness, Mr. Metcalf. *See* App. A, 7a. At the conclusion of the trial, the district court stated that it was required to believe Mr. Porter, when Porter stated that there would be 99.5 acres available for adult businesses to locate within Whittier, because of the maxim that a court is bound by the "interpretation of an ordinance given by the person who has the power to enforce them [sic]." RT at 254, lines 7-9; *see also* RT at 250, lines 12-15 (the court stated that the appellants "are bound by the interpretation that they give, wherever they give it. If they give it to a court, certainly they are bound by that interpretation. . . .").

Walnut misrepresents the findings made by the district court; the district court never made the so-called "critical" finding that there were insufficient alternative sites for adult businesses within Whittier.

II

WALNUT MISTAKENLY STATES THAT THE CLEARLY ERRONEOUS STANDARD APPLIES IN THIS CASE

Walnut appears to contend that the correct standard for this Court to apply is the "clearly erroneous" standard. Walnut's Brief at 7. The determination of the constitutionality of a statute is not a "finding of fact" but an interpretation of law, therefore the proper standard to be applied by this Court is *de novo* review. *See, e.g., United States v. Horowitz*, 756 F.2d 1400, 1403 (9th Cir.), *cert. denied*, —— U.S. ——, 106 S.Ct. 74 (1985); *Dumdeang v. Commissioner of Internal Revenue*, 739 F.2d 452, 453 (9th Cir. 1984); *California Teachers Ass'n. v. San Diego Community College Dist.*, 28 Cal. 3d 692, 699, 170 Cal.Rptr. 817, 621 P.2d 856 (1981).

III

WALNUT MISREPRESENTS THE PROCEEDINGS BELOW WHEN IT ARGUES THAT RES JUDICATA AND ABSTENTION DO NOT APPLY

Walnut claims that Whittier only "first raised *res judicata* after the district court orally announced its intention to rule in Walnut's favor." Walnut's Brief at 9. However, this is not the case. Whittier argued the preclusive effect of the state litigation as soon as that argument became available, and has renewed this issue whenever possible. On December 13, 1983, only five days after the published decision of the California Court of Appeal holding the Regulations valid was filed, Whittier filed a "Motion for Judicial Notice and Motion for Dismissal"

with the district court arguing that in light of the California appellate court's decision the federal litigation should be dismissed. Whittier renewed this motion at the hearing of February 13, 1984, in its objections to Walnut's Findings of Fact and Conclusions of Law, and again before the Ninth Circuit panel. In short, Whittier pursued the issue of the preclusive effect of the California appellate court decision as soon as it became available and has renewed it at every instance.

Walnut cites to *Tovar v. Billmeyer*, 721 F.2d 1260 (9th Cir. 1983) *cert. denied*, — U.S. —, 105 S.Ct. 223 (1984) for its argument that *res judicata* does not apply because where, "as here, plaintiffs preserve their rights to have Federal constitutional claims resolved in Federal court, the Federal court must exercise the jurisdiction entrusted to it. . . ." Walnut's Brief at 6. In *Tovar*, however, the court stated that "a free and unreserved submission to the state court of all federal claims for complete and final resolution is necessary to bar return to the federal court." *Tovar*, 721 F.2d at 1267 n.8 (quoting from *Tovar v. Billmeyer*, 609 F.2d 1291, 1293-94 (9th Cir. 1980)). In this case, Walnut has made this "free and unreserved submission" of all federal questions in the state court proceeding and these federal questions have been adjudged by the California courts. *See* App. J, 85a (Finding of Fact No. 6, prepared by counsel for Walnut, stating that all federal claims were presented in the state court proceedings); App. F, 45a-63a. In *Tovar*, the adult business owners purposely did not litigate their federal claims in state court in order to reserve federal jurisdiction; by contrast, in this case, Walnut has had two forums to litigate its federal claims—California state courts and the federal courts.

Similarly, Walnut misstates both the facts and the law in discussing *Younger* abstention.[3] Walnut states that abstention is inappropriate because Whittier filed an answer and counterclaim asking the district court to declare the Regulations constitutional. Walnut's Brief at 10. Walnut fails to inform this Court that Whittier's answer and counterclaim was filed on March 31, 1983, almost two years after Whittier filed its "Motion to Dismiss or Alternatively to Stay Action," wherein Whittier argued under *Younger v. Harris*, 401 U.S. 37 (1971) and *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) that abstention was required. This motion was filed in the district court on July 6, 1981. It is only because the district court orally denied Whittier's motion to abstain that an answer was filed.[4] *See* App. E, 40a (Conclusion of Law No. 2).

Moreover, the single case cited by Walnut on the issue of abstention does not apply the *Younger* doctrine. Rather, *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 487-88 (9th Cir. 1984), *rev'd on other grounds, Brockett v. Spokane Arcades, Inc.*, — U.S. —, 105 S.Ct. 2794 (1985), held that abstention under the doctrine of *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941) was inappropriate. On the issue raised in this case, the question of

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[3] Walnut mistakenly states that Whittier "concedes that under California law the district court was free to relitigate the issues remanded by the California Court of Appeal." Walnut's Brief at 8. Actually, Whittier asserts that the district court was required to dismiss this case under the doctrine of *Younger* abstention, and was not "free" to litigate any issues.

[4] It should also be noted that Whittier set forth as an affirmative defense in its answer that: "This Court lacks subject matter jurisdiction as to the purported claims set forth in the Plaintiff's [sic] Complaint." Answer at 3, lines 20-21.

whether abstention is appropriate under *Younger v. Harris*, 401 U.S. 37 (1971) and its progeny, the court in *J-R Distributors* stated:

> "It is not necessary to decide whether this is the type of case in which *Younger* abstention might otherwise be appropriate. . . ." 725 F.2d at 488-89 n.6.

Finally, while Walnut boldly asserts that the abstention issue is meritless by claiming that Whittier did not raise that issue before the Ninth Circuit panel, Walnut does not attempt to distinguish this Court's holding in *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 599 (1975), that *Younger* abstention may be considered for the first time before this Court because of its quasi-jurisdictional nature.

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CONCLUSION

For the reasons stated herein, Whittier submits that the Motion to Affirm is meritless and in no way contradicts Whittier's showing that the issues presented by this case are substantial. Whittier therefore again submits that a plenary hearing should be held on this matter.

Should this Court choose not to grant plenary review or summary reversal in this case, it should be noted that the issues involved as to the constitutionality of the Regulations are factually similar and legally identical to the issues involved in the *Renton* appeal. *City of Renton v. Playtime Theatres, Inc.*, No. 84-1360, *decision below*, 748 F.2d 527 (9th Cir. 1984). This Court should therefore hold this case until it decides *Renton* and, at the very least, reverse the Ninth Circuit panel's decision and re-

mand this case for reconsideration in light of this Court's decision in *Renton*.

Respectfully submitted,

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